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In the Supreme Court of the United States

OCTOBER TERM, 1978

LODGE 1858, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ET AL., PETITIONERS

v.

ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

RONALD R. GLANCZ
NEIL H. KOSLOWE
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-38a) is not yet officially reported. An earlier opinion of the court of appeals is reported at 436 F. 2d 882. The opinion of the district court (Pet. Supp. App. 23-85) is reported at 424 F. Supp. 186. An earlier opinion of the district court (Pet. Supp. App. 3-22) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1978. A timely petition for rehearing was denied on April 19, 1978 (Pet. Supp. App. 1). The petition for a writ of certiorari was filed on July 17, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether certain support service contracts entered into by the National Aeronautics and Space Admininstration are invalid under NASA's enabling act or the civil service laws.

STATEMENT

Section 203(b)(2) of the National Aeronautics and Space Act of 1958, as amended, 42 U.S.C. 2473(b)(2), authorizes the Administrator of the National Aeronautics and Space Administration to appoint and fix the compensation of employees "in accordance with the civil-service laws." Section 203(b)(5) of the Act, as amended, 42 U.S.C. 2473(b)(5), authorizes NASA to "enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate, * * * with any person, firm, association, corporation or educational institution."

NASA entered into contracts with private companies for support services at the George C. Marshall Flight Center, Huntsville, Alabama [the "Marshall Center"] (Pet. App. 8a; Pet. Supp. App. 23, 29). The services covered by the contracts ranged from routine maintenance to sophisticated technical assistance (Pet. App. 5a n.3; Pet. Supp. App. 7). In 1967 the annual value

of the contracts was approximately $70 million, and the number of support contractor personnel was 8,218 (Pet. App. 4a-5a n.1; Pet. Supp. App. 7).

As a result of budget cuts, NASA reduced its work force. It sent reduction in force ("RIF") notices to the six individual petitioners and approximately 760 other civil service employees at the Marshall Center on December 6, 1967. Under the RIF procedure, these employees would either be separated from government service or assigned to a lower grade or pay (Pet. Supp. App. 4). The support contractor personnel at the Marshall Center, who are not civil service employees, were not subject to any reduction in force, although, of course, the support contracts themselves were subject to termination or revision periodically (Pet. Supp. App. 4).

The six individual petitioners and their union filed this action on December 27, 1967, seeking declaratory and injunctive relief, reinstatement, and back pay and benefits. They argued that the support services contracts were invalid under Section 203(b)(2) of the Act, and that they violated civil service laws and regulations and the union's collective bargaining agreement with NASA (Pet. Supp. App. 4). Petitioners contended that the support contractor personnel functionally were employees of the federal government and should have been melded into the tenure roster, with the result that fewer of petitioners would have been subject to the RIF (Pet. App. 5a n.5). At the same time as they pursued this action, petitioners appealed administratively to the Civil Service Commission (436 F. 2d 882, 886).

The district court granted a preliminary injunction, halting the RIF pending the resolution of discussions between the Civil Service Commission and NASA concerning the legality of the RIF (Pet. Supp. App. 4-5).

A month later the Commission and NASA reached an agreement providing that all but 166 of the RIF notices were to be cancelled (*id.* at 5). The district court dissolved the preliminary injunction after this agreement was reached, and it dismissed the case for failure to exhaust administrative remedies (*ibid.*).

Petitioners appealed; while the appeal was pending, the Civil Service Commission issued a final decision upholding the RIF action (436 F. 2d at 895-896). In light of this, the court of appeals vacated the dismissal order and remanded the case to the district court, suggesting that petitioners be granted leave to file a supplemental pleading alleging exhaustion of administrative remedies (436 F. 2d at 897-898).[1]

On remand the district court granted partial summary judgment in favor of petitioners. The court held that Section 203(b)(2) of the Act prohibits NASA from entering into or enforcing support service contracts that create an "employer-employee" relationship between NASA and the support contractor personnel (Pet. Supp. App. 21-22). The court further held that if any of the Marshall Center support contractor personnel functionally were "employees" of NASA, the RIF to which petitioners and others had been subjected violated their retention preference rights, as spelled out in 5 U.S.C. 3501 *et seq.* and 5 C.F.R. 351 *et seq.* (Pet. Supp. App. 18). Finally, the court held that, in deciding whether the support contractor personnel at the Marshall Center functionally were employees of NASA, the standards set forth in a 1967 opinion of the general counsel of the Civil Service Commission, Leo Pellerzi, should be applied (*id.* at 21).

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[1]The court of appeals also rejected challenges to petitioners' and the intervenor's standing to sue (436 F. 2d at 890-894, 898-899).

Nevertheless, the district court did not grant petitioners immediate relief. Instead, the court referred the matter to the Civil Service Commission, with instructions to apply the "Pellerzi Standards" to the Marshall Center support services contracts and to report to the court whether these contracts created an employer-employee relationship between NASA and the support contractor personnel (Pet. Supp. App. 22).

The Civil Service Commission submitted its report, concluding that under the "Pellerzi Standards," as clarified by an opinion of the succeeding general counsel, Anthony Mondello, none of the 32 support service contracts at the Marshall Center created an employer-employee relationship between NASA and the support contractor personnel (Pet. Supp. App. 29).

The district court reviewed the report, to which it said it was bound to give "substantial consideration and great weight" (Pet. Supp. App. 33), and analyzed each of the Marshall Center support services contracts. It held that 22 of the contracts created an employer-employee relationship between NASA and the support contractor personnel and were invalid, two more contracts were partially invalid, and eight were valid (*id.* at 23-85). Accordingly, the court declared that the RIF actions against petitioners and other civil service employees were "unlawful," and it ordered NASA to cancel all such RIF actions and reinstate any demoted or discharged employees with back pay and employee benefits (*id.* at 85).

The court of appeals reversed (Pet. App. 3a-38a). It rejected petitioners' broad contention that Section 203(b)(2) of the Act prohibits NASA from using independent contractors and their employees to carry out

what petitioners termed NASA's "regular work functions" (Pet. App. 15a). The court concluded that that contention is contrary both to the purpose of Section 203(b)(5), which expressly authorizes NASA to contract with any person or entity in the performance of its functions, and to Congress' awareness and approval of the agency's contracting practices in consistently appropriating funds for those purposes (Pet. App. 14a-16a 35a-37a).

The court of appeals agreed with the district court that the dispositive issue is whether contractor personnel at the Marshall Center were treated as employees of NASA (Pet. App. 17a). Relying on *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318 (1974), the court of appeals disagreed with the standard applied by the district court to determine whether the support contractor personnel functionally were NASA employees. The court of appeals held that the "*degree of control* or *supervision* is the principal element that differentiates employees and independent contractors at common law, in the state statutory context, and in the context of other federal statutes as well" (Pet. App. 18a-20a).[2]

Applying that standard to the Marshall Center support services contracts and the record developed by the Commission, the court of appeals concluded that the Commission had correctly determined that none of the contractors' employees had been treated as NASA employees. The court stated (Pet. App. 21a-22a):

> the individual companies, not NASA, were to furnish the necessary management and personnel. It was the responsibility of each company to supervise, control, and direct the performance of its own employees in fulfilling the contract's requirements. These contracts required the companies to exercise their independent judgment. This is the classic independent contractor relationship.
>
> * * * * *
>
> Without supervision by NASA, the employees of the contractors for the supporting services cannot be viewed as employees for subsection (b) (2) purposes who must be appointed in accordance with the civil service laws.

[2]The court of appeals found that this approach is not inconsistent with the "Pellerzi Standards" as clarified by the "Mondello Supplement" (Pet. App. 23a-24a).

ARGUMENT

The decision of the court of appeals turns on the construction of contractual terms and the particular facts of the case; the issues it resolves are unexceptional. There is no conflict among the circuits and no reason for review by this Cou .

1. The principal issue considered by the courts below and the Civil Service Commission was whether, under established criteria, the employees of independent contractors at the Marshall Center acted as employees of NASA and thus, under Section 203(b)(2) of the Act, should have been appointed under the civil services laws. Petitioners do not directly address that issue; as in the court of appeals; their principal contention appears to be that Section 203(b)(2) requires NASA to "perform [all of] its regular governmental work functions" (Pet. 11) with "employees employed under the civil service laws" (*ibid.*; see generally Pet. 11-20). In other words, petitioners argue that NASA may not contract with independent contractors for work that could be performed by NASA employees. As the court of appeals held, that argument would read out of the statute Section 203(b)(5), which

authorizes NASA to "enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work * * * with any person, firm, association, corporation or educational institution."

Section 203(b)(2) provides only that officers and employees appointed by NASA—*i.e.*, NASA employees—shall be covered by the civil service and compensation laws. The court of appeals accepted the proposition that NASA cannot use outside contracts to engage persons who in all material respects serve as employees of NASA, since NASA employees must be appointed by the Administrator and must be subject to the civil service and compensation laws. But neither Section 203(b)(2) nor any provision of the civil service laws suggests that NASA, or any other agency, may not engage independent contractors and their personnel to do work that could be performed by NASA employees, or that could be described as a "governmental work function."

As the court of appeals stated (Pet. App. 14a-15a), petitioners' contention to the contrary "completely disregards the signficance of subsection (b)(5) which follows and bears directly on support service contracts * * *." Because everything a governmental agency does conceivably could be performed by federal employees, or could be described as a "governmental work function," petitioners' contention would prohibit contracting by NASA. But Congress unquestionably expected that "the contemplated expansion of functions of [NASA] will take place largely by means of contract work rather than through research conducted by the agency itself." 104

Cong. Rec. 9918 (1958) (remarks of Rep. McCormack).[3] See generally the court's analysis at Pet. App. 10a-17a, on which we rely.[4]

2. Having correctly rejected petitioners' broad contention, the court of appeals addressed the "narrower question" whether the contracts were "improperly administered so as to treat the contractor's employees as subsection (b)(2) employees * * *" (Pet. App. 17a). After reviewing the relevant statutes, the standards developed by the Civil Service Commission, and this court's opinion in *Kelly* v. *Southern Pacific Co.*, 419 U.S. 324 (1974), the court affirmed the Commission's determination that none of the contractor personnel had been treated as NASA employees. Pet. App. 17a-26a. Petitioners do not challenge the standards employed by the court of appeals or the application of those standards to the particular facts. There is therefore no reason for this Court to review that conclusion.

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[3]Petitioners' position is not supported by the fact, on which they rely (Pet. 16-20), that Section 203(b)(2) specifically exempts 425 NASA employees from civil service laws. As the court of appeals correctly stated, that exemption pertains only to employees of NASA and has nothing to do with employees of independent contractors engaged under Section 203(b)(5), which "is more than an exception to subsection (b)(2); it covers a different situation altogether." Pet. App. 15a.

[4]There is nothing to petitioners' claim (Pet. 21) that the court of appeals erred in finding additional support for its conclusions in Congress' awareness of NASA's support service contracting and its continued appropriation of funds for those purposes (see Pet. App. 35a-37a). Those appropriations are consistent with and confirm Congress' original expectation that NASA would rely significantly on outside contracting. The court did not read the appropriations legislation as changing the substantive legislation. Compare *Fleming* v. *Mohawk Wrecking and Lumber Co.*, 331 U.S. 111, 116 (1947), with *Tennessee Valley Authority* v. *Hill*, No. 76-1701 (June 15, 1978), slip op. 33-38. *United States* v. *Langston*, 118 U.S. 389 (1886), which involved such an argument, therefore is inapposite.

3. Petitioners also err in contending (Pet. 2, 8-10, 13-16) that the decision below is contrary to a different panel's decision in 1970 in the same case and contrary to determinations of the Comptroller General and the Civil Service Commission. The 1970 decision dealt only with issues of standing and exhaustion of administrative remedies. See 436 F. 2d at 898. At all events, any conflict between decisions of the same appellate court would be for that court to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

The determinations of the Comptroller General and the Commission to which petitioners refer (Pet. 6-7) were made with respect to *other* contracts entered into by NASA at the Goddard Space Center, not to the support services contract entered into at the Marshall Center. With respect to the Marshall Center contracts, the Civil Service Commission's position is clear; it concluded, in the proceedings required by the district court, that the contracts are valid and not in violation of the civil service laws (Pet. App. App. 29).[5]

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[5]Petitioners' final contention (Pet. 22-24)—that the decision below conflicts with *Wheelabrator Corp.* v. *Chafee*, 455 F. 2d 1306 (D.C. Cir. 1971) is insubstantial. *Wheelabrator* stands for the proposition that a district court should, in appropriate cases, refer particular issues to agencies expert in the subject matter for the court's guidance, but that the court should still have "the last word." 455 F. 2d at 1316-17. The court of appeals here applied those principles, and the fact that it agreed with the Commission rather than the district court does not suggest otherwise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK,
Assistant Attorney General

RONALD R. GLANCZ
NEIL H. KOSLOWE
Attorneys

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